CHEW LING HANG

v.

AW NGIONG HWA

COURT OF APPEAL, KUALA LUMPUR
SITI NORMA YAAKOB JCA
MAHADEV SHANKAR JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-02-723-1995]
24 JUNE 1997

FAMILY LAW: *Matrimonial property - Ancillary relief - Whether appellant had right to apply for ancillary relief after divorce - Whether leave required for application - Circumstances under which leave may be granted*

The appellant and the respondent were divorced in 1988. The respondent had filed his divorce petition in 1987 and had served the petition on the appellant with prayers for orders by way of an ancillary relief for half the proceeds of two properties and half the market value of all the shares and securities accquired by the appellant. The appellant who was represented at all times did not file an answer to the petition. When the *decree nisi* was granted the hearing for ancillary relief was adjourned into chambers but was not pursued by the respondent. Three years after the *decree nisi* was made absolute the appellant filed an application for ancillary relief claiming half a share of the house the respondent was staying in and for the car that was bought by the respondent before he filed the petition. The respondent opposed the application and contended that if leave was granted he should be allowed to revive his own application for ancillary relief. The issues before the court were: (i) whether a spouse who has not applied for ancillary relief before a decree is made absolute may make such an application at an indefinite time thereafter; (ii) if so, whether leave from the court is required; and (iii) under what circumstances should leave be granted.

Held:
Per Mahadev Shankar JCA:

[1] The Law Reform (Marriage and Divorce) Act 1976 ('the Act') and the Rules are advisedly so worded so that a decree absolute should, as far as is humanly possible, leave each spouse free to make a new life for himself or herself without being unjustly harassed by fresh claims from a disgruntled ex-spouse which should have been ventilated at the time the decree was being made.

[1a] The appellant's application for ancillary relief had to be made at the time the petition was filed by the respondent.

[1b] If a claim for ancillary relief is not made in the petition or answer it can be made subsequently at the trial. If it is made at the trial no notice is required under Form 11; or it can be made by leave of the court by notice in Form 11. Section 76 of the Act requires that the matter be dealt with when granting the decree. Therefore, a Form 11 notice has to be filed before the decree is made.

[2] Section 76(1) & (3) of the Act was applicable as the application was for the division of assets acquired during marriage. As the application was made after the decree absolute, the appellant was too late.

[3] The word "subsequently" in r. 56(2) of Divorce and Matrimonial Proceedings Rules 1980 ('the Rules') means after the answer was or should have been filed but before the grant of the decree absolute.

[4] The respondent's application for ancillary relief that was made in the petition had lapsed.

Obiter dicta

[1] There are situations where post-decree absolute applications are permitted with leave under r. 56(2)(b) or (3) of the Rules.

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG KELUARGA: *Harta suami isteri - Relief sampingan - Samada perayu mempunyai hak untuk memohon kepada relief sampingan selepas perceraian - Samada kebenaran diperlukan untuk permohonan - Di bawah keadaan yang bagaimana boleh kebenaran diberikan*

Perayu dan responden telah bercerai dalam tahun 1988. Responden telah memfailkan petisyen perceraiannya dalam tahun 1987 dan telah menyampaikan petisyen ke atas perayu dengan pohonan-pohohan bagi mendapatkan perintah melalui relief sampingan bagi setengah daripada hasil dari dua buah harta dan setengah bahagian dari nilai pasaran bagi kesemua saham-saham dan sekuriti-sekuriti yang telah diperolehi oleh si isteri. Perayu yang telah pada setiap waktu diwakili telah tidak memfailkan jawapan kepada petisyen tersebut. Apabila dekri nisi diberikan pembicaraan relief sampingan telah ditangguhkan ke dalam Kamar tetapi ianya telah tidak diteruskan oleh responden. Tiga tahun selepas dekri nisi itu dijadikan mutlak perayu telah memfailkan satu permohonan untuk mendapatkan relief sampinagan dengan menuntut setengah bahagian bagi rumah

yang telah didiami oleh responden dan bagi kereta yang telah dibeli oleh responden sebelum beliau memfailkan petisyen tersebut. Responden telah membantah permohonan tersebut dan menegaskan bahawa jika kebenaran diberikan beliau seharusnya dibenarkan untuk menghidupkan semula permohonan beliau sendiri untuk mendapatkan relief sampingan. Isu-isu yang terdapat di hadapan mahkamah adalah: (i) Samada seorang suami/isteri yang telah tidak memohon untuk mendapatkan relief sampingan sebelum sesuatu dekri dijadikan mutlak boleh membuat permohonan yang sedemikian pada satu masa yang tidak ditetapkan selepas itu; (ii) jika sedemikian, samada kebenaran daripada mahkamah diperlukan; dan (iii) di bawah keadaan yang bagaimanakah seharusnya kebenaran dibenarkan.

Diputuskan:
Oleh Mahadev Shankar HMR

[1] Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 (Akta tersebut) dan keadah-kaedah telah dipertimbangkan untuk diperkatakan sedemikian bahawa dekri nisi seharusnya hendaklah sejauhmana menurut peri kemanusiaan membiarkan setiap suami/isteri bebas untuk menjalani hidup baru bagi dirinya tanpa diganggu dengan tidak adilnya oleh tuntutan-tuntutan baru daripada bekas isteri/suami yang panas hati yang mana seharusnya diluahkan ketika dekri tersebut dibuat.

[1a] Permohonan perayu untuk mendapatkan relief sampingan hendaklah dibuat sebagai jawapan ketika petisyen tersebut difailkan oleh responden.

[1b] Jika tuntutan untuk relief sampingan tidak dibuat dalam petisyen tersebut atau dijawab ianya boleh dibuat kemudiannya di perbicaraan. Jika ianya dibuat diwaktu perbicaraan, tiada notis diperlukan di bawah Borang 11 atau ianya boleh dibuat menurut kebenaran mahkamah melalui notis Borang 11. Seksyen 76 Akta tersebut menghendaki supaya perkara itu diuruskan ketika memberikan dekri. Notis Borang 11 hendaklah difailkan sebelum dekri dibuat.

[2] Seksyen 76(1) dan (2) Akta tersebut adalah terpakai kerana permohonan tersebut adalah untuk pembahagian aset-aset yang telah diperolehi ketika perkahwinan. Oleh kerana permohonan tersebut telah dibuat selepas dekri mutlak, perayu dengan itu adalah ketinggalan.

[3] Perkataan “berikutan” bermaksud selepas jawapan telah atau seharusnya telah difailkan tetapi sebelum pemberian dekri mutlak tersebut.

[4] Perrmohonan responden untuk relief sampingan yang telah dibuat dalam petisyen tersebut dianggap sebagai telah luput.

Obiter dicta

[1] Terdapat situasi-situasi di mana permohonan-permohonan selepas dekri mutlak diberikan dengan kebenaran di bawah k. 56(2)(b) atau (3) Kaedah-kaedah tersebut.

[Rayuan ditolak dengan kos.]

Cases referred to:
Chaterjee v. Chaterjee [1976] 1 All ER 719 ***(refd)***
Leow Kooi Wah (p) v. Philip Ng Kok Seng [1995] 1 MLJ 852 ***(cit)***

Legislation referred to:
Divorce and Matrimonial Proceedings Rules 1980, rr. 56(1)(b), (2)(a), (b), (3)
Law Reform (Marriage and Divorce) Act 1976, s. 76(1), (3)
Family Proceedings Rules 1991 [UK], r. 2.53
Matrimonial Causes Act 1950 [UK], ss. 19, 20
Matrimonial Causes (Property and Maintenance) Act 1958 [UK], s. 1
Matrimonial Causes Rules 1973 [UK], r. 68
Matrimonial Causes Rules 1977 [UK], r. 68

Other sources referred to:
Law and Practice in Divorce and Family Matters, Rayden, 1983, 14th edn, vol 1, p 714
Family Proceedings, Humphreys', 18th edn, p 173
Halsbury's Laws of England, 4th edn, vol 13, para 713
A Practical Approach to Family Law, Jill Black, pp 152, 153
Family Law, Bromley, 8th edn, pp 724-726
Matrimonial Suits and Property Proceedings, Martyn Berkin, 3rd edn, p 165
Law and Practice in Divorce and Family Matters, Rayden & Jackson, 16th edn, vol 1, pp 702-703

[Appeal from High Court Malaya, Kuala Lumpur; Divorce Petition No: 85-47-364-1987]

For the appellant - Balwant Singh Sidhu; M/s Balwant Singh Sidhu & Co
For the respondent - Azhar Azizan Harun; M/s Azhar & Goh

JUDGMENT

Mahadev Shankar JCA:

Can a spouse who has not applied for ancillary relief before a divorce decree is made absolute, make such an application at an indefinite time thereafter? If so, can she do it without obtaining the leave of the court? If leave is required under what circumstances should it be granted?

In a very lucid judgment YA Datuk Abdul Aziz bin Mohamed held that such an application cannot be made without leave, and refused it.

In a nutshell the situation here was that the respondent (the husband) filed his Divorce Petition on 22 June 1987. The appellant (the ex-wife) who was duly served, and was legally represented at all material times, did NOT file an answer to the petition which contained prayers for orders by way of an ancillary relief to the effect that the wife pay him half the proceeds of two properties and half the market value of all shares and securities acquired by the wife during the marriage. When the *decree nisi* was granted on 10 February 1988 the judge adjourned the husband's prayers for ancillary relief into chambers.

The notes of evidence in the court below shows that the husband did not pursue his application on ancillary relief after the *decree nisi* was granted. On 14 June 1988 the *decree nisi* was made absolute.

The husband had purchased a house in Petaling Jaya in 1983. Both parties had lived in the house till 1985. Thereafter the husband stayed on in the said house, and paid the mortgage. In 1989 the husband remarried and continued to live in the said house with his new wife, her mother and an orphaned cousin. Before the petition was filed the husband had also bought a car.

More than three years after the decree absolute the ex-wife filed an application on 19 July 1991 for ancillary relief claiming a half share in the said house and in the car. This application was subsequently amended without objection. The application itself was vehemently opposed and the husband took the position that if leave was granted he should be allowed to revive his own application for ancillary relief which he did not pursue earlier. This aspect of the matter is now of academic interest.

Before us appellant's counsel asserted that since the ex-wife had not filed any answer at all, she did not require any leave from the court to apply for ancillary relief, and that the passage of any length of time after the decree of dissolution was irrelevant. He supported this bold submission by referring to various English authorities.

With the greatest respect we do not think they are of any assistance.

As is clear from *Chaterjee v. Chaterjee* [1976] 1 All ER 719 at 722 the power to grant ancillary relief in England was contained in ss. 19 and 20 of the Matrimonial Causes Act 1950. The words "on any decree" in these sections were construed in England to mean "within a reasonable time after the decree"; The dispute as to what this meant required Parliamentary intervention by the Matrimonial Causes (Property and Maintenance) Act 1958, which by s. 1 provides that:

(1) Any power of the court, under (ss. 19 and 20 of the 1950 Act and others sections) shall ... be exercisable either on pronouncing such a decree or at any time thereafter.

The fundamental rule governing applications in England by a petitioner or a respondent for ancillary relief were contained in r. 68 of the Matrimonial Causes Rules 1973, which reads as follows:

(1) Any application by a petitioner or by a respondent who files an answer claiming relief, for ...

(b) financial provision order,

(c) a property adjustment order,

shall be made in the petition or answer, as the case may be.

(2) Notwithstanding anything in para. (1), an application for ancillary relief which should have been made in the petition or answer may be made subsequently:

(a) by leave of the court.

This was replaced by The Matrimonial Causes Rules 1977, (r. 68) which in turn was replaced by r. 2.53 of the Family Proceedings Rules 1991, which reads:

2.53 Application by petitioner or respondent for ancillary relief

(1) Any application by a petitioner, or by a respondent who files an answer claiming relief, for:

(a) an order for maintenance pending suit,

(b) a financial provision order,

(c) a property adjustment order,

shall be made in the petition or answer, as the case may be.

(2) Notwithstanding anything in para. (1), an application for ancillary relief which should have been made in the petition or answer may be made subsequently:

(a) by leave of the court, either by notice in Form M11 or at the trial, or

(b) where the parties are agreed upon the terms of the proposed order, with leave by notice in Form M11.

> (3) An application by a petitioner or respondent for ancillary relief, not being an application which is required to be made in the petition or answer, shall be made by notice Form M11.

The commentaries in *Rayden's Law and Practice in Divorce and Family Matters* (14th Edn.) Vol. I [1983] at p. 714 reads:

The claim for any financial relief by a respondent spouse who files an answer claiming matrimonial relief (ie a prayer for decree) must be made in the answer: ...

> If it is not so made, either because at the time of application no such answer has been filed, or because it is not intended to file such an answer, then application by notice in Form 11 may be filed: a party who allows the suit to go through undefended is free of constraint in this regard at all times: in such case the claim or claims may be made without leave at any time (provided that the claimant has not remarried) *Charterjee v. Chaterjee* [1976] Fam 199 at 208, [1967] 1 All ER 719 at 724, CA, per Ormrod LJ. If an answer claiming matrimonial relief is filed and the claim is omitted therefrom, the leave of the court is required to make the claim by notice in Form 11 or at the trial.

Similar statements can be found in *Humphreys' Family Proceedings* (18th Edn.) at p. 173 where the critical passage reads:

> An application for ancillary relief which is not required to be made in the petition or answer (such as when an answer is filed not seeking a decree or where no answer has been filed) must be made by notice in form M11 (FPR, r. 2.53(3)(3)) (see p. 176 for requirements. Leave is not required.

and also in *Halsbury's Laws of England* (4th Edn.), Vol. 13 para. 713; *A Practical Approach to Family Law* by Jill Black pp. 152, 153 especially para. 3.3.2; *Bromley's Family Law* (8th Edn.) pp. 724-726; *Matrimonial Suits and Property Proceedings* (3rd Edn.) by Martyn Berkin p. 165 (para. 7); and finally Rayden and Jackson's *Law and Practice in Divorce and Family Matters* (16th Edn.) Vol. 1, pp. 702-703.

We must record here our appreciation of Mr. Sidhu for researching this question so thoroughly. It is a matter of regret to us that his industry cannot be more amply rewarded.

Reading the English cases on the point and the commentaries aforesaid we are convinced that the Malaysian Act and the Rules thereunder were advisedly so worded so that the decree absolute should as far as is humanly possible leave each spouse free to make a new life for himself or herself without being unjustly harassed by fresh claims from a disgruntled ex-spouse which should properly have been ventilated at the time the decree was being made.

The relevant section in our Act is very differently worded from the English legislation. Section 76 of the Law Reform (Marriage and Divorce) Act 1976 reads as follows:

> (1) The court shall have power, **when** granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of such assets and the division between the parties of the proceeds of sale.
>
> (3) The court shall have power, **when** granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

It is the opinion of this court that "when" here means at the time the decree is being granted. We have in a previous decision touched upon the undesirability of deferring the issues of ancillary relief especially in consent decrees. (See *Leow Kooi Wah (p) v. Philip Ng Kok Seng (Fifi Leong Kam Choon as Co-respondent)* [1995] 1 AMR 437). Occasions may arise where the legal advisors or even the court may think it tactically advisable to grant the decree first because, *inter alia*, it may simplify the resolution of the collateral issues. The residuary powers of the court to extend to abridge time is always there but the words are clear and any order for ancillary relief must relate back to the granting of the decree because it is upon the decree that the ancillary relief is hinged.

Rule 56 of the Divorce and Matrimonial Proceedings Rules 1980 makes the position clearer. It reads:

> 56 Application by petitioner or respondent for ancillary relief
>
> (1) Any application by a petitioner, or by a respondent who files an answer claiming relief, for:
>
> (a) an order for maintenance pending suit;
>
> (b) a property division order, under s. 76 of the Act; or
>
> (c) a maintenance order, under s. 77 of the Act,
>
> shall be made in the petition or answer, as the case may be.
>
> (2) Notwithstanding para. (1), an application for ancillary relief which should have been made in the petition or answer may be made subsequently:
>
> (a) by leave of the court, either by Notice in Form 11 or at the trial; or
>
> (b) where the parties are agreed upon the terms of the proposed order, without leave by notice in Form 11.

> (3) An application by a petitioner or respondent for ancillary relief, not being an application which is required to be made in the petition or answer shall be made by notice in Form 11.

In this case we are concerned only with r. 56(1)(b). The ex-wife's claim for property division had to be made in her answer. Our interpretation of r. 56(2)(a) is that if the claim for ancillary relief is not made in the petition or answer, it can be made subsequently at the trial, in which case no notice in Form 11 is required, or it can be made by leave of the court by notice in Form 11. Since s. 76 requires the matter to be dealt with when granting the decree we think the Form 11 notice must be filed before the decree is made.

The words "or at any time thereafter" which appears in the English Act is plainly missing in our statute. Since this case concerns an application for the division of assets acquired during marriage, it comes within the four walls of s. 76(1) and (3) of the Act. By failing to make her application before the *decree nisi* or at least before it was made absolute we think that the ex-wife was too late.

For the present purposes therefore it follows that our interpretation of the word "subsequently" in r. 56(2) means after the answer was or should have been filed but before the grant of the decree absolute.

The line taken by the judge in the court below was that the application could be made even after the decree provided leave was obtained. If this is the right approach then we must say that leave was properly refused in this case. There are other situations where post decree absolute applications are permitted with leave under r. 56(2)(b) or (3) which do not concern us here. It follows from what we have said that the husband's application for ancillary relief which was made in the petition must be deemed to have lapsed since no order was made thereon before the decree was made absolute.

For these reasons stated we dismiss this appeal with costs. Deposit to be paid to the respondent towards his taxed costs. Order accordingly.

Reported by Anne Soh